

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NIKERRAY MIDDLEBROOK,	§
	§
Defendant Below-	§ No. 358, 2006
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 9608015635
Plaintiff Below-	§
Appellee.	§

Submitted: November 17, 2006

Decided: January 23, 2007

Before **HOLLAND, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 23rd day of January 2007, after careful consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Nikerray Middlebrook, filed this appeal from the Superior Court's denial of his second and third motions for postconviction relief. On appeal, Middlebrook argues that the Superior Court abused its discretion in refusing to appoint counsel to represent him in the postconviction proceedings and for failing to order DNA testing, at State expense, on a face mask admitted into evidence at trial. We find no abuse of the Superior Court's discretion in denying Middlebrook's motion. Accordingly, we affirm.

(2) The record reflects that a Superior Court jury convicted Middlebrook in July 1997 of attempted first degree murder, first degree assault, two counts of possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited. The Superior Court sentenced Middlebrook to 37 years at Level V incarceration to be followed by one year of probation. This Court affirmed his convictions and sentence on appeal.¹ Thereafter, Middlebrook filed a petition for postconviction relief, which the Superior Court denied in December 2004. We affirmed on appeal.²

(3) In January 2006, Middlebrook filed his second petition for postconviction relief. His petition requested DNA testing of a face mask admitted into evidence at trial, which witnesses testified Middlebrook was wearing when he shot two people. The Superior Court requested a response from the State addressing whether the face mask had been preserved in a way that would make DNA testing theoretically helpful. The trial court also permitted a reply from Middlebrook, but prohibited further submissions. In May 2006, Middlebrook filed an “amendment” to his petition arguing his trial counsel had been ineffective, among other reasons, for failing to request

¹ *Middlebrook v. State*, 815 A.2d 739 (Del. 2003).

² *Middlebrook v. State*, 2005 WL 2334386 (Del. Sept. 21, 2005).

DNA testing of the face mask. The Superior Court deemed Middlebrook's "amendment" to be his third motion for postconviction relief. The Superior Court denied both motions on June 20, 2006.

(4) In this appeal, Middlebrook contends that the Superior Court erred in failing to appoint counsel to represent him in the postconviction proceedings and in failing to hold a hearing on his petition. Middlebrook also argues that the Superior Court abused its discretion in denying his request for DNA testing of the face mask.³ We review the Superior Court's denial of postconviction relief for abuse of discretion.⁴

(5) With respect to his claim regarding DNA testing, Middlebrook was required to establish the following: (i) the testing requested is of evidence secured in relation to the trial resulting in the conviction; (ii) the evidence was not previously tested because the technology for testing was not available at the time of the trial; (iii) there is a prima facie showing that identity was an issue at trial; (iv) there is a prima facie showing that the chain of custody of the evidence was sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or

³ Although Middlebrook raised a claim of ineffective assistance of counsel below, which the trial court rejected, he failed to brief the issue in this appeal. The failure to brief the issue constitutes a waiver of this claim on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁴ *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

replaced in any material aspect; (v) the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person's assertion of actual innocence; and (vi) the requested testing employs a scientific method that is generally accepted and satisfies the Delaware Rules of Evidence.⁵

(6) Based on the State's representations regarding the chain of custody of the mask and its contamination by multiple handlings of several police officers, prosecutors, court personnel and the jury, the Superior Court concluded that the mask could not provide any exculpatory evidence. Moreover, to the extent any testing revealed a lack of Middlebrook's DNA on the mask, this would do little to prove Middlebrook's claim of actual innocence in light of the testimony of two eyewitnesses who knew Middlebrook and identified him as the shooter. Finally, the evidence from Middlebrook's 1997 trial was destroyed in 2002. Consequently, at the time of his request, there was no evidence to test. Under the circumstances, we find no abuse of the Superior Court's discretion in denying Middlebrook's request for DNA testing.

(7) Given the Superior Court's conclusion that DNA testing could not advance Middlebrook's claim of actual innocence, we find no abuse of

⁵ 11 Del. C. § 4504(a) (Repl. 2001).

the Superior Court's discretion in denying Middlebrook's request for the appointment of counsel⁶ or in denying his motion without holding a hearing.⁷

(8) After careful consideration of the parties' positions on appeal, we find it manifest that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's well-reasoned decision dated June 20, 2006. Middlebrook's motion to stay this appeal, which was filed on January 10, 2007, is DENIED.

NOW, THEREFORE, IT IS ORDERED that Middlebrook's motion to stay is DENIED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁶ Del. Super. Ct. Crim. R. 61(e)(1) (2007) (providing that the Superior Court, in its discretion, may appoint counsel to represent an indigent movant in postconviction proceedings upon a showing of good cause).

⁷ *Maxion v. State*, 686 A.2d 148 (Del. 1996).